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IN THE

Supreme Court of the United States

October Term, 1979
No. 79-771

WILLIAM HERBERT ORR,

Appellant,

vs.

LILLIAN M. ORR,

Appellee.

MOTION TO DISMISS OR AFFIRM.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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Introduction.

In accordance with the provisions of Rule 16 of the *Rules of the Supreme Court of the United States,* Appellee Lillian M. Orr moves that this appeal be dismissed, or, in the alternative, that the judgment rendered below be affirmed, on the ground that the federal question posited by Appellant, if it exists at all, is not substantial, and therefore merits no further consideration in this or in any other forum.

Indeed, the question set forth by Appellant in his brief, whether the Alabama courts have followed this Court's mandate in *Orr v. Orr,* 440 U.S. 268 (1979), lacks substantiality to such a degree that Appellant's motive in again raising this appeal must now be given scrutiny. The Alabama courts chose *precisely* one of the alternatives declared by this Court in *Orr v. Orr, supra,* to lay open before them. Accordingly, that the Alabama courts followed this Court's mandate in *Orr v. Orr, supra,* cannot be questioned.

For this reason, Appellee not only brings this motion to dismiss, or, in the alternative, to affirm, but also requests that this Court assess interest, and damages at the rate of ten per cent, upon the judgment, as provided within Rule 56, Sections 1 and 2, of the *Rules of the Supreme Court of the United States,* and double costs, as provided within Rule 57, Section 7, of the same Rules, and also award attorneys' fees, against Appellant and in favor of Appellee. Appellee's request for interest, double costs, damages and attorneys' fees is based on the fact that it is manifest that this further appeal is baseless, and was brought by Appellant "mainly for delay," as expressed within the *Rules of the Supreme Court of the United States,* Rule 56, Section 2, and to continue the anxiety, grief, and financial burden which has been suffered by Appellee.

Statement of the Case.

The story of Orr versus Orr began in an Alabama courtroom almost six years ago, on February 26, 1974, when the Lee County Circuit Court entered a divorce decree which ended a marriage of 17 years. Since that day, due to Appellant's refusal to make those payments to Appellee which he had voluntarily assumed in a property settlement agreement negotiated and executed before that initial court hearing, the voice of their debate has sounded in courtrooms on both coasts of America, in California and in Alabama, and before in this Court.

Appellant William Herbert Orr is Chairman of the Board and President of Orrox Corporation, a publicly held company, founded by Appellant's father, with reported assets in excess of $5,000,000.00. At the time he executed the property settlement agreement,

under the terms of w. ich he assumed obligations to Appellee which he has since dishonored, Appellant was Vice President of Orrox. During the ensuing six years, his salaries and disbursements from Orrox have more than tripled.

Notwithstanding his continued personal and financial success, Appellant has abused the judicial process, and by means of his wealth, and the wealth of his family and his company, has repeatedly placed legal and other obstacles in Appellee's path which simply cannot be explained in economic terms. The legal costs which Appellant, or his family and company, must by this time have incurred far outweigh any possible savings in the form of unpaid alimony.

Appellant began his strategy of legal harassment against Appellee in late 1975, when he moved the Lee County Circuit Court, in Alabama, for an order which would lower his alimony. Because his financial condition had actually *improved* since the date the original settlement agreement had been entered into, his request for a reduction was denied in June, 1976. Immediately, in utter disregard for the intent of the Alabama court ruling, Appellant ceased making payments of any kind to Appellee, including not only alimony, but also premiums on insurance policies which he was bound to maintain under the terms of his agreement with Appellee. Since Appellee had suffered a heart attack during the prior year, this abrupt and indefensible act left her virtually uninsurable, with almost no way in which to meet her financial obligations.

With nowhere to turn, on July 28, 1976, Appellee instituted a contempt action against Appellant for unpaid alimony. The Lee County Circuit Court ruled in Appellee's favor on August 19, 1976, found Appellant

in contempt, and entered judgment against him for the amount then due under the property settlement agreement. It was at the hearing on that contempt action, more than two years after the property settlement agreement had been negotiated and executed, that Appellant first raised the constitutional issue which was decided by this Court in *Orr v. Orr,* 440 U.S. 268 (1979).

Appellant flatly refused to obey the August 19, 1976 court order. Accordingly, Appellee was forced to seek additional orders, which have subsequently been entered in her favor by the same Alabama court, on October 6, 1976 and on February 14, 1977, adjudging Appellant in contempt and ordering him to pay those obligations which he had assumed in 1974.

Predictably, Appellant also refused to obey the last two Alabama court orders. To enforce those two judgments, Appellee was required to petition the Santa Clara County Superior Court, in California, where Appellant had moved. In late 1978, partially because of uncertainty as to the status of Appellant's constitutional argument, the California court, on Appellant's motion, reduced Appellee's alimony. An appeal has been taken from that judgment by both parties to this controversy. That matter now awaits decision in the California Court of Appeals.

After *Orr v. Orr,* 440 U.S. 268 (1979), was decided on March 5, 1979, bringing to a successful conclusion Appellant's trek through the Alabama Court of Civil Appeals, and the Supreme Court of Alabama, Appellee brought a motion to affirm the August 19, 1976 judgment of the Lee County Circuit Court, and requested the Alabama Court of Civil Appeals to choose one of the several constitutional alternatives offered

to it by this Court. The Court of Civil Appeals, in *Orr v. Orr.* 374 So.2d 895 (Ala. Civ. App., 1979), chose one of the alternatives that had been clearly stated within *Orr v. Orr,* 440 U.S. 268 (1979). Nevertheless, Appellant applied for a rehearing, and then appealed to the Supreme Court of Alabama, which denied Appellant's petition for a writ of certiorari, *Ex Parte William Herbert Orr,* 374 So.2d 898 (Ala., 1979). Appellant then brought this baseless appeal to the Supreme Court of the United States. The story which Appellant incompletely summarized has now spanned more than half a decade.

No Substantial Federal Question Exists.

In *Orr v. Orr,* 440 U.S. 268, 271-272 (1979), this Court declared as follows:

> "It is therefore possible that his (Appellant's) success here will not ultimately bring him relief from the judgment outstanding against him, as *the State could respond to a reversal by neutrally extending alimony rights to needy husbands as well as wives.* In that event, *Mr. Orr would remain obligated* to his wife." (Emphasis supplied.)

On remand from the Supreme Court of the United States, in *Orr v. Orr,* 374 So.2d 895, 897 (Ala. Civ. App., 1979), the Alabama Court of Civil Appeals declared as follows:

> "Because *we here respond to reversal by neutrally extending alimony rights to needy husbands as well as wives,* we hold that the wife's motion to affirm the judgment reached below is due to be granted." (Emphasis supplied.)

That the Alabama Court followed *exactly* the mandate of this Court could be no clearer. Because the

Alabama Court satisfied the command of the Constitution, as interpreted by this Court, by extending alimony benefits to both sexes, and by rendering the Alabama alimony statutes gender-neutral, "Mr. Orr . . . remain(s) obligated to his wife." *Orr v. Orr,* 440 U.S. 268, 272 (1979).

When after an equal protection attack, a challenged statute is ruled underinclusive, the court, as a matter of state law, may remedy the unconstitutional situation either by extending the benefits of the statute to the class which was wrongfully excluded, or by declaring the statute a nullity. This court explicitly enunciated this principle not only in *Orr v. Orr,* 440 U.S. 268, 272 (1979), but also in numerous prior cases. In *Welsh v. United States,* 398 U.S. 333, 361 (1970) (Harlan, J., concurring), for example, the state law choice was succinctly set forth:

> "Where a statute is defective because of underinclusion, there exist two remedial alternatives. A Court may either declare it a nullity, and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion."

The choice of how to remedy the defective statute has repeatedly been recognized by this Court to belong to the state courts. In *Stanton v. Stanton,* 421 U.S. 7 (1975), for example, a Utah statute which established different ages of majority for males and females was struck down. When the case was appealed once more to this Court, it was again emphasized that the state courts had been accorded the choice of remedy, as a state law matter, provided that the statute was made

gender-neutral. As set forth in the second Stanton opinion, *Stanton v. Stanton,* 429 U.S. 501, 504, n.4 (1977):

> "*The only constraint on its power to choose is the principle reiterated here, that the two sexes must be treated equally.* There are at least two lines of authority that the Utah court legitimately might choose to follow. . . . The Utah court might elect to adopt age 21 as the age of majority in the absence of a valid statute governing child-support cases. On the other hand, the court might take note of the Utah Legislature's response to *Stanton I* in its enactment of the 1975 amendment of Section 15-2-1 and read the amendment as an extension by the Legislature that the public policy of Utah is to treat both males and females as adults at a younger age. By suggesting these two options we do not mean to exhaust all other possibilities; we simply mention them to illustrate the fact that *our opinion leaves open this state-law issue for the state courts to decide.*" (Emphasis supplied.)

When faced with the choice of extension or nullification in gender discrimination cases, this Court has consistently chosen to extend the coverage of the unconstitutional statute (*Califano v. Goldfarb,* 430 U.S. 199 (1977); *Jablon v. Secretary of Health, Education and Welfare,* 430 U.S. 924 (1977), affirming 399 F.Supp. 118 (D. Md., 1975); *Weinberger v. Wiesenfield,* 420 U.S. 636 (1975); *Frontiero v. Richardson,* 411 U.S. 677 (1973)), just as it suggested in *Orr v. Orr,* 440 U.S. 268, 272 (1979), and just as the Alabama Court of Civil Appeals decided on remand.

Thus, the Alabama Court of Civil Appeals succinctly followed the directive of this Court as set forth in

Orr v. Orr, 440 U.S. 268 (1979), by choosing the alternative most consistently followed by this Court in extending alimony benefits in a completely gender-neutral fashion.

The Alabama courts did not, as blatantly misstated on pages 2 and 3 of Appellant's Brief, declare those statutes constitutional. Instead, the courts, and later the legislature, changed the statutes in accordance with this Court's directive.

In determining which alternative, extension or nullification, is more proper, a court should examine legislative intent. The test for a court is "to decide whether it more nearly accords with Congress' (or the legislature's) wishes to eliminate its policy altogether or extend it . . . to render what Congress (or the legislature) plainly did intend, constitutional." *Welsh v. United States,* 398 U.S. 333, 355-356 (1970). The Alabama Court of Civil Appeals, in *Orr v. Orr,* 374 So.2d 895 (Ala. Civ. App., 1979), squarely considered the intent of the Alabama Legislature, and concluded that its policy, to preserve the economic *status quo,* required extension, on a gender-neutral basis, rather than nullification. That their conclusion as to legislative intent was correct has been proven by the Alabama Legislature's passage of Act No. 486, Regular Session 1979, which was effective on July 27, 1979. Current Alabama Code sections, as amended by Act No. 486, have been attached to Appellee's Brief as Appendix "A". The Alabama Code sections set forth within Appendix "D" to Appellant's Brief are no longer law and have no force or effect whatsoever. Act No. 486 amended the alimony statutes at issue in *Orr v. Orr,* 440 U.S. 268 (1979), and extended alimony benefits to both husbands and wives on a gender-neutral basis.

The decision of the Alabama Supreme Court not to grant Appellant's petition for a writ of certiorari, Appendix "A" to Appellant's Brief, on which decision this appeal is based, cited the passage of Act No. 486 with obvious approval.

It is clear that both the Alabama courts and the Alabama Legislature have followed, exactly and without qualification, this Court's mandate in *Orr v. Orr,* 440 U.S. 268 (1979).

A simple contractual argument would also support the Alabama Court of Civil Appeals' decision to require Appellant to fulfill those obligations which he had voluntarily assumed in 1974. As stated by this Court in *Orr v. Orr,* 440 U.S. 268, 283-284 (1979):

> "It is open to the Alabama courts on remand to consider whether Mr. Orr's stipulated agreement to pay alimony, or other grounds of gender-neutral state law, bind him to continue his alimony payments."

Because it was unnecessary, this state law issue was not considered by the Alabama courts. Other purely state law issues, left open for consideration under this Court's directive in *Orr v. Orr,* 440 U.S. 268 (1979), were similarly not reached for decision by the Alabama courts, because the Alabama Court of Civil Appeals chose the most simple, most equitable alternative offered to it by the mandate of this Court—to extend the benefits of the alimony statutes to all persons who could require their aid, on a gender-neutral basis, in full compliance with the Equal Protection Clause of the *United States Constitution.*

Reminiscent of his failure to raise the constitutional question originally at issue in *Orr v. Orr,* 440 U.S. 268 (1979), until more than two years after his negotia-

tion and execution of his property settlement agreement with Appellee, Appellant seems to imply, on pages ten and 11 of his Brief, for the first time since the consideration of this case either on remand, or at any other time, that the Due Process Clause requires that he receive a new hearing, apparently at the trial court level, under the gender-neutral Alabama alimony statutes.

This argument is not sanctioned by any case authority, and, as set forth within this Brief, its application runs counter to the procedure laid out for remand in a myriad of this Court's decisions, including *Orr v. Orr,* 440 U.S. 268 (1979).

Further, since the Due Process issue was not raised by Appellant in either the Alabama Court of Civil Appeals, or in the Supreme Court of Alabama, and is introduced here for the first time since this case has been considered on remand, and for the first time in any court, it is untimely. This Court will not and should not consider issues raised so tardily. *Singleton v. Wulff,* 428 U.S. 106, 121 (1976); *United States v. Ortiz,* 422 U.S. 891, 898 (1975).

There simply is no federal question remaining in this case. Both the Alabama courts and the Alabama Legislature, in deciding the state law issue, carefully followed this Court's directive in *Orr v. Orr,* 440 U.S. 268 (1979), and extended the benefits of the Alabama alimony statutes on a completely gender-neutral basis. For this reason, Appellant's cause must fall for lack of jurisdiction.

This Court Should Award Appellee Interest, Damages, Double Costs and Attorneys' Fees.

This is a frivolous appeal. It has been brought by Appellant, and financed by means of his personal, family and company wealth, for the purpose of delay, and to strike one more blow at a woman who has by now suffered enough.

To fend off this latest attack, Appellee, an already impoverished woman, has been required to incur even more attorneys' fees, and to again absorb the not insignificant cost of an appeal to the United States Supreme Court.

All this to oppose an utterly baseless appeal. With the exception of the various *Orr v. Orr* opinions, Appellant cites 13 cases in his brief. Five of those opinions were issued in the nineteenth century, and ten of the 13 were written before the last decade. Indeed, only three opinions cited by Appellant were issued after 1964.

In his desperate attempt to create a federal question on which to appeal, Appellant has reached into the nineteenth century for such basic authority as *Martin v. Hunter's Lessee,* 14 U.S. (1 Wheat.) 304 (1816), to support the simple and unquestioned concept that this Court is the supreme court of the land. No one needs argue that point any more. The lower courts in this controversy have of course recognized that supremacy by following precisely, even to the exact language, the directive set forth in *Orr v. Orr,* 440 U.S. 268 (1979). The Alabama Legislature similarly recognized this Court's supremacy by changing the under-

inclusive statutes, a fact which was not even mentioned in Appellant's Brief.

Because such outrageous behavior should not be countenanced, the *Rules of the Supreme Court of the United States* contain several mechanisms of discouragement. The pertinent Rules, as well as statutory authority for sanctions, are contained in Appendix "B" to Appellee's Brief. Rule 57, Section 7, authorizes this Court to adjudge double costs, while Rule 56, Section 2, states the following:

> "In all cases where an appeal delays proceedings on the judgment of the lower court, and appears to have been sued out merely for delay, damages at a rate not exceeding 10 per cent, in addition to interest, may be awarded upon the amount of the judgment."

Similarly, Rule 56, Section 1, provides for interest on the full amount of the judgment, calculated from the date of entry of the judgment below, in addition to the ten per cent penalty set forth in Rule 56, Section 2.

Rule 56, Section 2 (formerly Rule 23), was the basis for a five per cent penalty assessed against an appellant where there was in fact no federal question in *Deming v. Carlisle Packing Co.*, 226 U.S. 102 (1912). There, this Court reasoned that the most logical purpose for a frivolous appeal was delay, and so the penalty, as authorized by the Rule, was awarded to the appellee and against the appellant. Accord, *Slaker v. O'Connor*, 278 U.S. 188, 190-191 (1929).

This Court has before recognized the need for an award of attorneys' fees to persons whose courtroom opponents have acted in bad faith. *Hall v. Cole*, 412

U.S. 1, 4-5 (1973); *Alyeska Pipeline Service Co. v. Wilderness Society, Inc.*, 421 U.S. 240, 258-259 (1975).

In this situation, the August 19, 1976 judgment, from which this appeal flows, equalled $5,524.00. As set forth in Rule 56, Section 1, this Court should award interest, at the rate of six per cent, in accordance with Alabama law, *Code of Alabama 1975*, Sections 8-8-1 and 8-8-10, on the full amount of that judgment, calculated from the date of entry of judgment, August 19, 1976. The interest award may be based on the simple ground that the judgment below has now been affirmed.

A ten per cent penalty, as additional damages, should be awarded as well, based upon the undeniable fact that Appellant has brought this baseless and frivolous appeal "mainly for delay," as expressed within Rule 56, Section 2.

Finally, double costs, as authorized by Rule 57, Section 7, and attorneys' fees, as appropriately recognized by this Court in *Hall v. Cole, supra,* and *Alyeska Pipeline Service Co. v. Wilderness Society, Inc., supra,* should be awarded to Appellee on the ground that Appellant has acted in bad faith by bringing this baseless appeal for purposes of delay and harassment. Statutory authority for all such awards, "just damages for delay," is contained in Section 1912, Title 28, of the *United States Code.* A memorandum of costs will be submitted to this Court after its decision has been rendered.

Conclusion.

The federal question set forth by Appellant simply does not exist. This Court has no jurisdiction to entertain a non-existent and insubstantial federal question. Only state law issues are involved.

But more importantly, Appellant must be shown that his abuse of the judicial process cannot continue, and sanctions should be awarded.

The story which began almost six years ago, in an Alabama courtroom, must now find its just conclusion with the bold and appropriate order of this high Court.

Respectfully submitted,

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APPENDIX A.

Former *Code of Alabama 1975*, Sections 30-2-51 and 30-2-52, set forth within Appendix "D" to Appellant's Brief, was amended by Act No. 486, Regular Session 1979. Former *Code of Alabama 1975*, Section 30-2-53, which was also set forth within Appendix "D" to Appellant's Brief, was repealed by the same Act.

Current *Code of Alabama 1975*, Sections 30-2-31, 30-2-50, 30-2-51, 30-2-52, and 30-2-54, law of the State of Alabama since July 27, 1979, due to the passage of Act No. 486, Regular Session 1979, provides as follows:

Section 30-2-31. Proceedings generally; alimony; child custody and support.

The proceedings in such cases are the same in all respects, and the court has the same power to make an allowance to either spouse out of the estate of the other spouse and provide for the custody and education of the children of the marriage, as provided in this Code for divorces from the bonds of matrimony.

Section 30-2-50. Allowance for support dur[illegible] pendency of action.

Pending an action for divorce, the court may make an allowance for the support of either spouse out of the estate of the other spouse, suitable to the spouse's estate and the condition in life of the parties, for a period of time not longer than necessary for the prosecution of the complaint for divorce.

Section 30-2-51. Allowance upon grant of divorce; certain property not considered.

If either spouse has no separate estate or if it be insufficient for the maintenance of such spouse, the judge, upon granting a divorce, at his discretion, may order to such spouse an allowance out of the estate of the other spouse, taking into consideration the value thereof and the condition of the spouse's family; provided, however, that the judge may not take into consideration any property acquired prior to the marriage of the parties or by inheritance or gift unless the trial judge finds from the evidence that such property, or income produced by such property, has been used regularly for the common benefit of the parties during their marriage.

Section 30-2-52. Allowance upon grant of divorce for misconduct; certain property not considered.

If the divorce is in favor of either spouse for the misconduct of the other spouse, the judge trying the case shall have the right to make an allowance to either spouse out of the estate of either spouse, or not make an allowance as the circumstances of the case may justify, and if an allowance is made, the misconduct of either spouse may be considered in determining the amount; provided, however, that any property acquired prior to the marriage of the parties or by inheritance or gift may not be considered in determining the amount.

Section 30-2-54. Award of attorneys' fees in action where contempt citation issued.

In all actions for divorce or for the recovery of alimony, maintenance or support in which a

judgment of divorce has been issued or is pending and a contempt of court citation has been made by the court against either party, the court may, of its discretion, upon application therefor, award a reasonable sum as fees or compensation of the attorney or attorneys representing both parties.

APPENDIX B.

Rule 56, Sections 1 and 2, of the *Rules of the Supreme Court of the United States,* provides as follows:

Rule 56. Interest and damages

1. Where judgments for the payment of money are affirmed, and interest is properly allowable, it shall be calculated from the date of entry of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the state where such judgment was rendered.

2. In all cases where an appeal delays proceedings on the judgment of the lower court, and appears to have been sued out merely for delay, damages at a rate not exceeding 10 per cent, in addition to interest, may be awarded upon the amount of the judgment.

Rule 57, Section 7, of the *Rules of the Supreme Court of the United States,* provides as follows:

Rule 57. Costs

7. In appropriate instances, the court may adjudge double costs.

Section 1912. Title 28, of the *United States Code,* provides as follows:

Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs.